

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH BRIM,) Case Nos. CV 12-08107 DDP ✓
12 Plaintiff,) [CV 99-02201 DDP]
13 v.) [SA CR 93-00098 LHM]
14 UNITED STATES OF AMERICA,) ORDER DENYING PETITIONER'S MOTION
15 Defendant.) UNDER 28 U.S.C. § 2255(f)(3) TO
16) VACATE SENTENCE BY A PERSON IN
17 _____) FEDERAL CUSTODY, DENYING MOTION
18) FOR APPOINTMENT OF COUNSEL,
19) DENYING REQUEST FOR CORRECTIVE
20) JUDGMENT, GRANTING RULE 36
21) MOTION, AND REOPENING TIME TO
22) FILE AN APPEAL

Before the court are Petitioner's Motion Under 28 U.S.C. § 2255(f)(3) to Vacate . . . , Motion for Appointment of Counsel, Motion for Corrective Judgment, Motion Pursuant to Rule 36, and Motion for Order Reopening Time to File Appeal. Having considered Petitioner's submissions, the court adopts the following order.

The lengthy background of this case is set forth in detail in the October 21, 2002, Report and Recommendation of United States Magistrate Judge denying Petitioner Brian Keith Brim's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255.

cc: BOP [SEE SECTION IV]

1 The court adopted the Magistrate Judge's Report and
2 Recommendation and entered judgment denying Petitioner's § 2255
3 Motion with prejudice on November 24, 2003.

4 On July 11, 2007, Petitioner filed a purported application for
5 writ of habeas corpus pursuant to 28 U.S.C. § 2241. However, on
6 February 5, 2008, this court held that the application was properly
7 construed as another motion to vacate Petitioner's conviction, and
8 therefore denied it as an untimely and successive § 2255 motion.

9 On May 16, 2011, Petitioner filed a Motion to Reopen his
10 initial § 2255 Motion pursuant to Federal Rule of Civil Procedure
11 60(b) ("Rule 60(b)"). Petitioner then filed, on January 23, 2012,
12 a Motion pursuant to Federal Rule of Criminal Procedure 36 ("Rule
13 36"), asking the court to hold his Rule 60(b) Motion in abeyance
14 and instead correct an alleged clerical error in the Magistrate
15 Judge's Report and Recommendation. This court denied both Motions,
16 construing them as third and fourth requests for relief under §
17 2255.

18 On September 20, 2012, Petitioner filed a Motion to Vacate,
19 Set Aside or Correct Sentence by a Person in Federal Custody, and
20 on December 18, 2012, filed a Motion for Appointment of Counsel,
21 presently before the court. On April 11, 2013, Petitioner filed a
22 Request for Corrective Judgment, also presently before the court.

23 **I. § 2255 Motion**

24 Petitioner now files a fifth request for relief under § 2255.
25 He argues that under two recent Supreme Court cases, Missouri v.
26 Frye, 132 S. Ct. 1399 (2012) and Lafler v. Cooper, 132 S. Ct. 1376
27 (2012), his trial counsel's failure to timely convey a written
28 government plea offer before the expiration date of the plea offer

1 deprived him of effective assistance of counsel and actually
2 prejudiced him. A second or successive § 2255 petition is
3 appropriate if it contains "a new rule of constitutional law, made
4 retroactive to cases on collateral review by the Supreme Court,
5 that was previously unavailable." 28 U.S.C. § 2255(h). However, a
6 second or successive motion must also be "certified . . . by a
7 panel of the appropriate court of appeals," 28 U.S.C. § 2255(h).
8 In the absence of such certification, the court DENIES the Motion
9 without prejudice.

10 **II. Request for Corrective Judgment**

11 It appears to the court that this Request constitutes a sixth
12 request for relief under § 2255. Like the § 2255 Motion before the
13 court, this Motion has not been certified by a panel of the court
14 of appeal and the court must therefore deny it. Unlike the § 2255
15 Motion before the court, this Motion does not purport to contain
16 newly discovered evidence or a new rule of constitutional law which
17 would justify a successive motion. This Motion appears to repeat
18 arguments pertaining to the quantity of PCP involved in the
19 offense, which Petitioner made in previous § 2255 motions and which
20 have already been rejected by the court and the Court of Appeals.

21 See Order Denying Petitioner's Motions to Reopen and to Correct
22 Clerical Error, 99-CV-02201-DDP-MLG. See also United States v.
23 Brim, 148 Fed. Appx. 619, 621 (9th Cir. 2005)("[T]he failure to
24 research the drug purity and discover a possible lower minimum
25 offense level did not affect the sentencing range of 360 months to
26 life offered in the plea agreement.") The court DENIES the Request.

27 ///

28 ///

1 **III. Appointment of Counsel**

2 There is no constitutional right to appointment of counsel in
3 federal or state habeas corpus proceedings. See McCleskey v. Zant,
4 499 U.S. 467, 495 (1991); United States v. Angelone, 894 F.2d 1129,
5 1130 (9th Cir. 1990). Pursuant to 18 U.S.C. § 3006A(a)(2)(B), the
6 district court may provide representation to any financially
7 eligible person whenever "the court determines that the interests
8 of justice so require." In exercising its discretion, "the
9 district court must evaluate the likelihood of success on the
10 merits as well as the ability of the petitioner to articulate his
11 claims pro se in light of the complexity of the legal issues
12 involved." Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983).
13 The Ninth Circuit has held that "indigent state prisoners applying
14 for habeas corpus relief are not entitled to appointed counsel
15 unless the circumstances of a particular case indicate that
16 appointed counsel is necessary to prevent due process violations."
17 Chaney v Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986).

18 Petitioner states that "it is in the interest of justice that
19 counsel be assigned." The court finds that at this time the
20 appointment of counsel is not necessary to avoid due process
21 violations in this case, and the interests of justice do not
22 require appointment of counsel. Petitioner was able to articulate
23 his grounds clearly in his petition and make cogent arguments in
24 support of his petition. Accordingly, petitioner's request for
25 appointment of counsel is DENIED without prejudice.

26 ///

27 ///

28 ///

1 **IV. Rule 36 Motion**

2 Petitioner argues that he was charged \$150 as a special
3 assessment in the underlying criminal case but should only have
4 been charged \$50. He argues that the three special assessments
5 constitute multiple punishments for the same act. He asks the court
6 to correct the assessment under Rule 36 of the Federal Rules of
7 Criminal Procedure.

8 Petitioner was convicted on three counts: (1) conspiracy to
9 manufacture PCP, (2) possession of PCC with intent to manufacture
10 PCP, and (3) intent to manufacture PCP. The Ninth Circuit affirmed
11 his conviction on the conspiracy count, but vacated and stayed the
12 convictions and sentences on the other two counts:

13 [In a previous case, the Ninth Circuit held that] although the
14 defendant was properly charged and tried on separate counts
15 for each step in the manufacturing process, he could be
16 convicted and sentenced for only one. . . . Cumulative
17 punishments for attempt and for conspiracy under § 846 are not
18 permissible when only one criminal undertaking is involved.

19 Because the possession, attempt, and conspiracy here [in
20 Petitioner's case] were clearly all parts of one criminal
21 undertaking, the district court should have sentenced Brim on
22 only one of the counts.

23 United States v. Brim, 129 F.3d 128 (9th Cir. 1997)(internal
24 citations and quotation marks omitted). The Ninth Circuit thus
25 vacated the judgments of conviction and the sentences on two counts
26 and ordered their entries stayed pending completion of the sentence
27 on the first count.

28

1 Petitioner cites Rutledge v. United States, 517 U.S. 292
2 (1996), which held that special assessments are considered to be
3 punishments and that it is inappropriate to impose two assessments
4 on two convictions when one of them is a lesser included offense.
5 In Rutledge, a petitioner who had been found guilty of
6 participating in a conspiracy to distribute controlled substances
7 and also of conducting a criminal enterprise was improperly
8 sentenced to concurrent life sentences for the two charges because
9 one was a lesser included offense of the other; although the
10 sentences were served concurrently, the special assessment of \$50
11 on the second conviction meant that the conviction amounted to a
12 second punishment for the same activity.

13 The court finds that Petitioner's situation is similar. Given
14 that the Ninth Circuit vacated the judgments of conviction and
15 sentences on two of three counts because all three counts were part
16 of one criminal undertaking, imposing a separate assessment upon
17 each of the three counts would likewise constitute multiple
18 punishments for the same criminal undertaking. The court therefore
19 GRANTS the Rule 36 Motion and orders that the assessment be reduced
20 from \$150 to a total of \$50.

21 **V. Motion to Reopen Time to File Appeal**

22 Good cause being shown, the court GRANTS Petitioner's Motion
23 to Reopen Time to File Appeal of this court's order denying
24 petitioner's Rule 60(b) Motion on September 14, 2012. Petitioner
25 may file a notice of appeal **within 30 days of this Order**.

26 **VI. Conclusion**

27 For the reasons stated above, the petitioner's Motion under §
28 2255, Motion for Appointment of Counsel, and Motion for Corrective

1 Judgment are DENIED without prejudice. Petitioner's Rule 36 Motion
2 and Motion to Reopen Time to File Appeal are GRANTED.

3 IT IS SO ORDERED.

4

5 Dated: July 19, 2013

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



DEAN D. PREGERSON
United States District Judge